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Editor's Note: In this issue, Karen L. Reed of Bateman Seidl, PC analyzes *Rio Grande Silvery Minnow v. Bureau of Reclamation* (*Minnow IV*), a recent Tenth Circuit decision involving Endangered Species Act and constitutional law issues. We have reproduced the entire article below. For those who prefer to view it in PDF format, a copy will be posted on the Section's website: http://www.osbenviro.homestead.com/.

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***Rio Grande Silvery Minnow v. Bureau of Reclamation* (*Minnow IV*), 601 F.3d 1096 (10th Cir. 2010).**

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Overview

This opinion marks the end of a long struggle over the scope of federal agency obligations to comply with the consultation requirements of the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.* This case began more than ten years ago in the New Mexico District Court and has resulted in three rounds of appeals to the Tenth Circuit.[2] The parties to this protracted and bitterly fought litigation were federal, state and local governmental entities, an irrigation district serving both American Indian and non-Indian farmers and private nonprofit environmental advocacy organizations. These diverse parties represented a myriad of conflicting legal and political interests.

Although this case raised interesting and important issues under the ESA, ultimately it was decided based on constitutional mootness. Mootness (on both constitutional and prudential grounds) is a common issue in administrative appeals, because agencies can and often do take corrective action during the pendency of a lawsuit to address past and continuing violations of

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[2] *Rio Grande Silvery Minnow v. Keys* (*Minnow III*), 355 F.3d 1215 (10th Cir. 2004); *Rio Grande Silvery Minnow v. Keys* (*Minnow II*), 333 F.3d 1109 (10th Cir. 2003); *Rio Grande Silvery Minnow v. Keys* (*Minnow I*), 46 Fed. Appx. 929, 33 Envtl. L. Rep. 20,060 (10th Cir. 2002).

the law. This opinion addressed mootness arising both from an act of Congress and from voluntary corrective action by the agency. The court examined the applicability of the voluntary-cessation exception to the mootness doctrine under these circumstances.

Background

Since the 1950s the Bureau of Reclamation (Bureau) of the U.S. Department of the Interior has operated several dams and reservoirs along the Middle Rio Grande, which is the portion of the Rio Grande that runs through New Mexico, and its tributaries. These dams were constructed to provide flood control and water supplies to municipal and agricultural water users in the Middle Rio Grande Valley, and the Bureau has entered into contracts with these water users for or has otherwise committed to beneficial use virtually the entire firm yield[3] from these reservoirs.

The Rio Grande silvery minnow (Minnow) is an endangered species that currently is confined in the wild to a small stretch of the Middle Rio Grande that represents less than five percent of its historic habitat. Due to the many natural and human demands for water from the Rio Grande, this stretch of river often experiences drying during the hot summer months, particularly following a spring when runoff from upstream mountains is low. Minnows that are stranded in these drying areas will die unless they can escape to areas of the river that remain wet or are physically transported to these areas by rescue workers.

When federal agencies engage in activities likely to affect listed species, Section 7(a)(2) of the ESA requires that agency, known as the "action agency," to consult with the U.S. Fish and Wildlife Service (Service), for terrestrial and freshwater species, as in this case, or the NOAA Fisheries Service (formerly the National Marine Fisheries Service), for marine and anadromous species. *See* 50 C.F.R. § 402.01(b). The appropriate consulting agency then determines whether the proposed actions are likely to jeopardize the continued existence of a listed species and issues a biological opinion stating its conclusions. 16 U.S.C. § 1536(a)(2). If a finding of jeopardy is made, the action agency must either eliminate jeopardy through approved mitigation (known as "reasonable and prudent alternatives") or refrain from taking the proposed action.

Case History

Various environmental organizations sued the Bureau in 1999, arguing that the Bureau had not fulfilled its obligation to engage in a consultation with the Service on the full range of the Bureau's discretionary activities on the Middle Rio Grande and its tributaries.[4] The State of New Mexico intervened as a defendant due to its sovereign and proprietary interests in and control of the state's waters. *See*, *e.g.*, *California v. United States*, 438 U.S. 645, 667-68 (1978) (holding that federal water projects are subject to state laws governing rights to use water). The Bureau argued that, because all of the water from the Middle Rio Grande Project was

[3] The "firm yield" is the amount of water that can be sustainably withdrawn for use without depleting a reservoir.

[4] Federal agencies are not required to consult under Section 7(a)(2) of the ESA on nondiscretionary activities. 50 C.F.R. § 402.03.

contractually or otherwise committed, it had no discretion to suspend water deliveries to the water users and instead use the water for the Minnow.[5]

Thus, the key legal issue presented in this case was whether the Bureau had discretionary control, within the meaning of the ESA, over its water deliveries under the Middle Rio Grande Project's enabling legislation and the specific provisions of the water users' contracts. The plaintiff environmental organizations argued that the Bureau could provide water to the Minnow without violating its obligations. In a series of unpublished opinions, the district court agreed and found that the Bureau did have discretion. In accordance with these opinions, the district court granted the plaintiffs' motion for preliminary injunctive relief. Several parties appealed to the Tenth Circuit, and a divided three-judge panel affirmed the district court. *Minnow II*, 333 F.3d at 1138.

Then, however, subsequent acts of Congress altered the Bureau's ESA consultation obligation with respect to the Middle Rio Grande Project. Essentially, these acts provided that a newly issued biological opinion, which superseded the biological opinions the plaintiffs were challenging in the litigation, was deemed to satisfy the ESA's consultation requirements through March 2013.[6] These acts had the effect of foreclosing plaintiffs from judicially challenging the sufficiency of the new biological opinion under the ESA for ten years.

Because, during the pendency of the appeal,[7] the biological opinions being challenged in the litigation had been replaced by the new biological opinion, which was not at issue in the case, the Tenth Circuit found that the appeal was moot, vacated its opinion affirming the award of preliminary injunctive relief and remanded the case to the district court. *Minnow III*, 355 F.3d at 1222. However, the Tenth Circuit did not decide whether the underlying case on the merits was moot.

After remand, the defendants filed motions to dismiss, arguing that the entire case was moot because it no longer presented a live case or controversy.[8] The defendants also sought vacatur of the district court's opinions regarding the scope of the Bureau's discretion, arguing that the intervening mootness effectively prevented the aggrieved parties from obtaining

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[5] The parties did not dispute that the United States could exercise its police power to seize water from the water users and provide it to the Minnow, but such a seizure (in the absence of agency discretion) would constitute a contractual default and would require just compensation to the water users under the Fifth Amendment to the U.S. Constitution. So the crux of this case was who should pay for water for the Minnow. On several occasions during the pendency of this case, when the Rio Grande started to dry, the State of New Mexico voluntarily made water available for the Minnow to avoid catastrophic Klamath-like confrontations between water users and the federal government over this issue.

[6] Energy and Water Development Appropriations Act, 2003, Pub. L. No. 108-137, § 208, 117 Stat. 1827, 1849-50 (2003) (providing that the new biological opinion satisfied ESA requirements for two years); Consolidated Appropriations Act, 2004, Pub. L. No. 108-447, § 205, 118 Stat. 2809, 2949 (2004) (extending the compliance period to ten years); Energy and Water Development Appropriations Act, 2006, Pub. L. No. 109-103, § 121(b), 119 Stat. 2247, 2256 (2005) (providing that any amendments to the new biological opinion also satisfied the ESA).

[7] Although the three-judge panel had issued an opinion, a motion for rehearing en banc was still pending, and the Tenth Circuit had not yet issued a mandate.

[8] On remand, the plaintiffs initially agreed that the case was moot, but later changed their position and argued against mootness. *Minnow IV* at *5.

appellate review. The district court found that the case was not moot and denied the motions for vacatur. *Rio Grande Silvery Minnow v. Keys*, 469 F. Supp. 2d 1003, 1016 (D.N.M. 2005). This appeal followed, and the Tenth Circuit reversed.

Discussion

The plaintiffs argued that the case was not moot because the court was "situated to provide *some* relief, especially declaratory relief regarding the scope of [the Bureau's] discretion in consultation." *Minnow IV* at *7.[9] The plaintiffs asserted that at some point in time, and by 2013 at the latest, the Bureau would have to reinitiate ESA consultation on its Middle Rio Grande operations, and the issue of the Bureau's discretion would inevitably arise again.[10] Admittedly, this argument has a practical appeal. This case was pending for over a decade and constituted a substantial drain on the resources of the parties, who were governmental entities and nonprofit organizations, without full and final resolution of the fundamental question at the heart of the controversy: What is the scope of the Bureau's discretion for the operation of the Middle Rio Grande Project?

However, as the Tenth Circuit recognized, the absence of the constitutionally required live case or controversy robs a federal court of subject-matter jurisdiction. *Minnow IV* at *6. The court explained that it could not issue an advisory opinion no matter how meritorious the claim might be. *Id.* "'The crucial question is whether granting a *present* determination of the issues offered will have some effect in the real world.'" *Id.* (emphasis in original) (quoting *Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207, 1212 (10th Cir. 2005) (quotation omitted)). The court concluded that the plaintiffs' claims were "far too speculative to support a claim for declaratory relief." *Id.* at *8. In reaching this conclusion, the Tenth Circuit relied on several Ninth Circuit cases finding cases moot when the challenged biological opinions were superseded.[11]

The Tenth Circuit then distinguished another Ninth Circuit opinion, *Forest Guardians v. Johanns*, 450 F.3d 455 (9th Cir. 2006). In *Forest Guardians*, an environmental plaintiff challenged the U.S. Forest Service for failing to reinitiate consultation after it admitted that it was not complying (and did not intend to comply in the future) with annual monitoring requirements integral to the Service's concurrence in a not-likely-to-adversely-affect finding. *Id.* at 459-60. Days before the Forest Service's responsive appellate brief was due, it reinitiated consultation and then argued that the case was moot. *Id.* at 461 n.4. The Ninth Circuit found that the case was not moot, because the "case … involve[s] a continuing practice," and "the Forest Service's practice of not complying with the monitoring requirements is likely to persist." *Id.* at 462.

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[9] As of the date of this publication, reporter pagination was not available for *Minnow IV*, so pinpoint citations refer to Westlaw pages.

[10] The district court had agreed, noting: "It is virtually a certainty that there will be more ESA consultations in the near future over water operations in the [M]iddle Rio Grande." 469 F. Supp. 2d at 1009.

[11] *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089 (9th Cir. 2003); *Am. Rivers v. Nat'l Marine Fisheries Serv.*, 126 F.3d 1118 (9th Cir. 1997); *Ramsey v. Kantor*, 96 F.3d 434 (9th Cir. 1996).

The court in *Forest Guardians* focused its analysis on whether it could provide effective present relief and did not explicitly address the voluntary-cessation exception to the mootness doctrine. However, the Ninth Circuit's opinion comports with the basic principle of this exception to mootness, which is "'the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior.'" *Minnow IV* at *11 (quoting *Unified Sch. Dist. No. 259 v. Disability Rights Ctr. of Kan.*, 491 F.3d 1143, 1149 (10th Cir. 2007) (quotation omitted)). Thus this exception involves the court in evaluating subjective intent.

In *Forest Guardians*, the Ninth Circuit implied that the Forest Service's reinitiation of consultation may have been motivated more by a desire to moot the case than by the Forest Service's desire to comply with the ESA. *See* 450 F.3d at 461 n.4. To the contrary, in *Minnow IV*, the district court found, and the Tenth Circuit agreed, that there was no evidence the Bureau reinitiated consultation for the purpose of mooting the litigation.[12] Consequently the Tenth Circuit explicitly rejected the applicability of this exception to the mootness doctrine, even though the court also acknowledged that the Bureau was free to continue maintaining that it had limited discretion with respect to Middle Rio Grande Project water deliveries. *Minnow IV* at *13.

After reaching the conclusion in *Minnow IV* that the voluntary-cessation exception was inapplicable, the Tenth Circuit also discussed an exclusion from the voluntary-cessation exception. As articulated by the U.S. Supreme Court, voluntary cessation of challenged conduct nonetheless will moot a case, and the voluntary-cessation exception to mootness will not apply, if: "'(1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'" *Id.* (omissions in original) (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)).

The district court and the Tenth Circuit applied differing interpretive glosses to the first prong of the *County of Los Angeles* test and reached opposing conclusions. The district court had ruled this exclusion was inapplicable because the Bureau "failed to establish that it is *absolutely clear* that [it] would not return to [its] wrongful use of an impermissibly narrow and limited scope of discretion in future ESA consultations." 469 F. Supp. 2d at 1009 (emphasis added). The Tenth Circuit rejected this analysis and held that the correct inquiry was whether there was any "reasonable expectation that [the Bureau's] actions could give rise to the scope-of-discretion issue *in the same (or essentially the same) manner*" as the current case. *Minnow IV* at *13 (emphasis added).

In concluding that there was no such expectation, the Tenth Circuit emphasized the fact that the new biological opinion afforded ESA compliance for a ten-year period, making it very unlikely that the Bureau would reinitiate consultation prior to March 2013. *Id.* at *14. The court concluded that, even if the scope-of-discretion conflict arose in the future, "it would be in a different regulatory context." *Id.* at *13. Ironically, however, by the time the Tenth Circuit issued its opinion, less than three years remained until March 2013, making it very likely that consultation will be reinitiated within the next several years. As a result of the Tenth Circuit's

[12] In fact, the Bureau reinitiated consultation because the prior biological opinion was about to expire.

decision, when this reinitiation occurs, the Bureau and the Service will have no guidance from the federal courts regarding the scope of the Bureau's discretion.

In addressing the second prong of the *County of Los Angeles* test – whether interim relief or events have completely and irrevocably eradicated the effects of the alleged violation – the district court and the Tenth Circuit again reached opposing conclusions. The district court focused on the effects of the alleged violations on the Minnow, noting that, "it may never be known how the [Bureau's] dogged refusal to consider using [Middle Rio Grande P]roject water in past years to prevent unnecessary river drying has affected the downward spiral of the … [M]innow." 469 F. Supp. 2d at 1010. The Tenth Circuit focused instead on harm to the plaintiffs' procedural rights, stating that any injury inflicted upon the plaintiffs did not survive issuance of the new biological opinion, which superseded and replaced the challenged biological opinions. *Minnow IV* at *14.

I believe the Tenth Circuit erred in applying the second prong of the *County of Los Angeles* test. Courts across the country have long recognized that the ESA's consultation requirement affords both procedural and (often more importantly) substantive protections to litigants' interests in listed species. *See*, *e.g.*, *id.* at *2 ("Section 7(a)(2) [of the ESA] imposes both a procedural and a substantive obligation on federal agencies.") (citation omitted) (citing *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 667 (2007)). In this case, the Tenth Circuit inexplicably ignored this substantive component, i.e., the harm to the Minnow that may have resulted from the Bureau's decisions in the past to consult on a limited scope of discretion.[13]

The facts of *County of Los Angeles* illustrate the proper application of this exemption from the voluntary-cessation exception to the mootness doctrine. In that case, the county's hiring practices for firefighters were at issue. The plaintiffs argued that these hiring practices were discriminatory and had a disproportionate impact on minorities. During the pendency of the litigation, the county adopted new hiring practices that "resulted … in a minority hiring level which consistently, though by varying amounts, exceeded 50%." *County of Los Angeles*, 440 U.S. at 632. Moreover, even prior to the initiation of the lawsuit, the county had publicly taken the position that the hiring practices at issue in the litigation were "unsatisfactory," making it highly unlikely that the county would ever reinstate those practices. *Id.* at 632-33. Under those circumstances, it was entirely appropriate to find the case moot.

The facts of *Minnow IV* stand in sharp contrast. As noted above, the Bureau has continued to assert that its discretion over Middle Rio Grande Project waters is limited. In addition, it is undisputed that the last remaining wild populations of Minnow, which live in areas of the Rio Grande prone to drying, remain critically endangered. Thus, the stage is set for a repeat of this litigation in the first dry summer following March 2013.

[13] Moreover, because the Tenth Circuit already had decided that the voluntary-cessation exception was not applicable, it did not even need to discuss the *County of Los Angeles* test, which determines when a case that qualifies under the voluntary-cessation exception nonetheless is moot.

Conclusion

This litigation proved to be frustrating and unsatisfying for many. Some public officials in New Mexico were so frustrated that they inadvisably impugned the character of the trial judge, which only served to incense the federal courts. *See* Minnow IV at *23. Nonetheless, I believe the real legacy of this litigation is positive. Widespread dissatisfaction with the federal court process spurred a spirit of cooperation outside the context of litigation.

The Middle Rio Grande Endangered Species Collaborative Program was established in January 2000 and remains an active voluntary organization performing on-the-ground work to benefit the Minnow and other listed species in the Middle Rio Grande Valley. *See* Middle Rio Grande Endangered Species Collaborative Program, http://www.middleriogrande.com (last visited May 18, 2010). This program currently has seventeen members representing a wide diversity of interests. *See* Collaborative Program Signatories, http://www.middleriogrande.com/Default.aspx?tabid=178 (last visited May 18, 2010).

In my opinion, the collaborative program is the best and brightest hope not only for the Minnow but also for the many water users along the Middle Rio Grande who must cope daily with the realities of living in an arid region. Although its governance structure, which emphasizes consensus-based decision making, can be cumbersome, this recent opinion of the Tenth Circuit serves to emphasize the importance of fostering broadly supported nonlitigation-based solutions to competing water demands in the Middle Rio Grande Valley. Perhaps the next time a crisis arises due to drought, the Minnow will have made substantial enough progress in the wild, thanks to these ongoing efforts, that parties will not feel compelled to race to the courthouse.

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